

MINUTES OF JULY 9, 2018

The regular meeting of the Sussex County Board of Adjustment was held on Monday, July 9, 2018, at 7:00 p.m. in the County Council Chambers, 2 The Circle, Georgetown, Delaware.

The meeting was called to order at 7:00 p.m. with Chairman Dale Callaway presiding. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. John Mills and Mr. Brent Workman. Mr. Bruce Mears was absent. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, and staff members Mrs. Jennifer Walls – Planning Manager and Ms. Christin Headley – Recording Secretary.

The Pledge of Allegiance was led by Mr. Callaway.

Motion by Mr. Mills, seconded by Ms. Magee, and carried unanimously to approve the agenda as circulated. Motion carried 4 – 0.

Motion by Mr. Mills, seconded by Mr. Workman, and carried unanimously to approve the Minutes and Findings of Facts for May 7, 2018. Motion carried 4 – 0.

Mr. Sharp read a statement explaining how the Board of Adjustment meeting is conducted and the procedures for hearing the case.

OLD BUSINESS

Case No. 12157 – Concord Flea Market, LLC seeks a special use exception for an outdoor promotional activity (Sections 115-72 and 115-210 of the Sussex County Zoning Code). The property is located on the north side of Concord Rd. (Rt. 20), approximately 480 feet west of Concord Pond Rd. 911 Address: 10599 Concord Rd., Seaford. Zoning District: B-1. Tax Map: 132-2.12-5.00

Mrs. Walls presented the case and stated that this case was previously left open by the Board for a recommendation from the Planning & Zoning Commission.

Mr. Sharp stated that this was unusual and there were some questions about what kind of limitations could be put on this application; that he discussed this application with the attorney for the Planning and Zoning Commission and it was decided that it would not be proper for the application to come before them in case there was ever an application of sorts before the Commission with regard to that property; that staff has discussed the application and drafted some proposed conditions which, if the application were approved by the Board with those conditions, would limit the scope of the project; and that the Board would need to revoke the referral to the Planning and Zoning Commission before discussing the application on its merits.

Motion by Mr. Mills, seconded by Ms. Magee, and carried unanimously **to revoke the referral to the Planning and Zoning Commission**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Mr. Callaway opened the case for discussion.

Mr. Mills stated that the Board could condition the use on hours of operation, days of operation, etc.; that one of the concerns he recalled was that the tents will remain up on days when it is not open; that the applicant has a responsibility to obtain agency approvals; that the Board should only consider what has been applied for and not what may be requested in the future; and that a final site plan would be required.

Mr. Sharp stated that site plan review would be performed by Commission.

Mr. Workman stated that he would like to see no tables along Route 20 due to traffic concerns and that Route 20 is a busy road.

Mr. Mills stated that the answer to Mr. Workman's concern is to require that the tents and tables remain within the building envelope.

Mr. Sharp suggested that the Board impose a condition that no tents or tables be placed within the setback areas.

Ms. Walls confirmed that the Property is zoned B-1 and has a front yard setback of 60 feet for non-residential uses.

Mr. Mills stated that the Applicant has requested hours of operation between 8:00 am and 6:00 pm, Thursday, Friday and Sunday; that it is important that the tents come down when not in use as they are not permanent structures; that the Applicant must meet the setback requirements; and that approval for 1 year may be appropriate to see if there are any issues with the project.

Mr. Sharp stated that the Applicant will be required to go to the Commission for the site plan review process; that the approval would be limited to the proposed flea market use; and that, if the Applicant wanted to do other uses, he would need to return to the County for proper approvals.

Mr. Mills moved to approve Special Use Exception Application No. 12157 for the requested special use exception, subject to the following conditions, based on the record made at the public hearing, because the use will not substantially affect the uses of neighboring and adjacent properties:

1. Hours of Operation be from 8:00 am – 6:00 pm.
2. Days of Operation be only Thursday, Friday, and Sunday.
3. The tents and tables be removed when not in use. Tents may be installed no earlier than Wednesday and must be removed by Monday.
4. The special use exception for a flea market use is restricted to the areas to the east and west of the existing building. Tents and tables are not to be located to the rear of the

building.

5. All the tents and tables shall be placed within the building envelope and are not to be placed in the setback areas. The standard building setback requirements for the B-1 zone shall be used.
6. This approval shall be limited to one (1) year but could be renewed for a longer term if the applicant applies for a renewal.
7. The Applicant must attain all the agency approvals necessary. The use is limited to flea market use only and no special events may be held at this location.
8. The Applicant shall apply for and obtain final site plan from the Planning and Zoning Commission.
9. This use will not substantially affect adversely the uses of adjacent and neighboring properties.

Motion by Mr. Mills, seconded by Mr. Workman, and carried unanimously that the **special use exception be grant with the conditions listed**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

PUBLIC HEARINGS

Case No. 12153 – Christopher Quinn & Angela Culp seek variances from the rear yard setback, side yard setback, and separation distance between units for existing and proposed structures (Sections 115-25 and 115-172 of the Sussex County Zoning Code). The property is located on the west side of Atlantic Ave., approximately 150 feet south of Parkview Rd. 911 Address: 19948 Atlantic Ave., Rehoboth Beach. Zoning District: AR-1. Tax Parcel: 334-13.00-310.00-3385

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of the Application or in opposition to the Application and six mail returns. The Applicants seek a variance of 4.6 feet from the five (5) feet required rear yard setback requirement for an existing shed, a variance of 7.8 feet from the twenty (20) feet separation distance requirement from the dwelling on Lot #31 for the existing shed, a variance of 12.0 feet from the (20) feet separation distance requirement from the shed on Lot #30 for a proposed dwelling, a variance of 5.1 feet from the twenty (20) feet separation distance from the existing dwelling on Lot #30 for a proposed dwelling, a variance of 5.4 feet from the twenty (20) feet separation distance from the existing dwelling on Lot #30 for a proposed dwelling, a variance of 4 feet from the five (5) feet side yard setback requirement on the north side for the proposed dwelling, a variance of 2.3 feet from the twenty (20) feet separation distance from the existing dwelling on Lot #34 for an existing sunroom, and a variance of 8.3 feet from the twenty (20) feet separation distance from the existing deck on Lot #34 for an existing sunroom.

Chad Meredith, Esquire, presented the Application on behalf of the Applicants. Mr. Meredith stated that the applicants could not attend the hearing as Mr. Quinn is traveling for business and Mrs.

Culp is undergoing chemotherapy treatment.

Mr. Meredith verified that the following attachments were given to board members:

- Park approval for the new dwelling – exterior improvement request.
- Two surveys – one of the existing dwelling and accessory building, and the other for the proposed dwelling.

Mr. Meredith stated that he had copies of the letter of support of the application and the affidavit of Christopher Quinn and Angela Culp, which he submitted into the record; that, if anyone from the Board or from the public had any remarks that would require testimony from the applicant, he would request to keep the record open for that specific reason.

Mr. Sharp advised the Board that he received a call from Mr. Meredith about his clients not being able to attend and that, if the Board felt the need to ask questions of the Applicant, the record could be left open for that purpose.

Mr. Meredith recited the letter in support submitted by Joe Gentile, who owns Lot #30, and the affidavit executed by the Applicants. Mr. Meredith stated that variances are needed on all sides of the Property; that the manufactured home has not been placed on the lot; that the home will be a used manufactured home but will be new to the Applicants; that the Applicants have turned down or lost other manufactured homes; that the existing sunroom will remain and cannot be moved; that there will be no entrance to the north side of the home; and that he is unaware of an HVAC system being proposed.

The Board found that no parties appeared in support of or in opposition to the Application.

Mr. Mills moved to approve Variance Application No. 12153 for the requested variances based on the record made at the public hearing and for the following reasons:

1. The Property is unique due to its size and shape and because smaller mobile homes are difficult to find;
2. The variances are necessary to enable reasonable use of the property;
3. The exceptional practical difficulty has not been created by the Applicants because they purchased the property as is;
4. The variances will not alter the essential character of the neighborhood because there are similar variances in the neighborhood;
5. The variances will not be detrimental to the public welfare; and
6. The requested variances are the minimum variance necessary to afford relief.

Motion by Mr. Mills, seconded by Mr. Workman, and carried unanimously that the **variances be granted for the reasons stated**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12163 – Mt. Olivet Brethern Church seeks a special use exception to operate a day care facility (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the west side of Shortly Rd., approximately 1,388 feet north of Hardscrabble Rd. (Rt. 20). 911 Address: 28096 Shortly Rd., Georgetown. Zoning District: AR-1. Tax Parcel: 133-14.00-13.01

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of the Application, one letter of opposition to the Application and one mail return. The letter of opposition received was from the property owner when he discovered that the congregation was not in favor of the proposed daycare. Mrs. Walls noted that the letter was received today.

Mr. Sharp stated that the Application could be withdrawn since there is no longer consent from the property owner. He noted that the letter was not received in time to remove the case from the agenda without the Board's approval.

The Board found that no parties appeared in support of or in opposition to the Application.

Mr. Callaway stated that a motion could be made to withdraw the application.

Mr. Sharp stated that it made sense to withdraw the Application. He noted that if it were a denial then a similar application would be precluded for a period of one year, whereas if it is a withdrawal and the Church wishes to proceed with a daycare at a later date, they could submit a new application.

Motion by Mr. Mills, seconded by Ms. Magee, and carried unanimously that **the Board allow Case No. 12163 to be withdrawn.** Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12164 – Cape Henlopen School District seeks a special use exception to use a manufactured home type structure as a temporary classroom (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the east side of John J. Williams Hwy. (Rt. 24), approximately 1,247 feet south of Mulberry Knoll Rd. 911 Address: 19483 John J. Williams Hwy., Lewes. Zoning District: AR-1. Tax Parcel: 334-12.00-107.00

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of the Application or in opposition to the Application. Mrs. Walls stated that request is for manufactured type homes to be used as classrooms until 2023 when the new middle school will open. At this time, the request is to place just one modular, but an additional may be

required in the next two years.

Lenny Richardson, Supervisor of Facilities for the Cape Henlopen School District, was sworn in to testify about the Application.

Mr. Richardson testified that the request is to place modular classrooms in the same location as the previous modular classrooms which were removed from the Property three years ago; that these modulars will provide additional space for the overcrowded school while the new middle school is being built; and that the new middle school is projected to open in 2023.

Ms. Magee asked if the request is just for one modular.

Mr. Richardson testified that the request is for two modular classrooms, but one would be purchased and put in place this year and one would be placed next year; that the modular classrooms would be placed in the exact same place as the previous modular classrooms and, if the school district were to ask for additional modular, they could not place them in the same location but would have to put them along the fence on Route 24 which would not be ideal; that the capacity of the school is 528 student and 659 students are enrolled; that the use will not substantially affect adversely the uses of neighboring and adjacent properties; and that the Applicant received no complaints about the prior modular classrooms on the site.

The Board found that no parties appeared in support of or in opposition to the Application.

Mr. Mills moved to approve Application No. 12164 for the requested special use exception for 2 modular classrooms based on the record made at the public hearing and because the use will not substantially affect adversely the use of adjacent neighboring properties nor was there testimony to the contrary

Motion by Mr. Mills, seconded by Ms. Magee, and carried unanimously that the **special use exception be granted for the reasons stated**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12172 – Leonard Wright & Kristine Griffin seek variances from the side yard setback requirement for a proposed structure (Section 115-34 of the Sussex County Zoning Code). The property is located on the east side of E. Stoney Run, approximately 50 feet south of Bluewater Run E. 911 Address: None available. Zoning District: MR-RPC. Tax Parcel: 533-19.00-329.00

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received one (1) letter of support of the Application and no letters of opposition to the Application. There were no mail returns. The Applicant seeks a variance of 4.0 feet from the ten (10) feet side yard setback requirement for a proposed dwelling on the north side and a variance of 3.0 feet from the ten (10) side

yard setback requirement for a proposed dwelling on the south side. Mrs. Walls stated that the Board should have received a revised exhibit showing the revised variances from the original application.

Bryan Elliot was sworn in to testify about the Application.

Mr. Elliot testified that the applicants request variances for the side yard setbacks; that the property is unique as it is only 0.19 acres and not square; that it is a narrow lot; that the property cannot otherwise be developed; that the applicant is only trying to build a 1,658 square-foot home on this lot; that this difficulty has not been created by the applicant but by the uniqueness of the lot; that the property is located on a lagoon in Keen-Wik sound; that it will not affect the essential character of the neighborhood but rather enhance it; that the variances would not adversely affect any of the neighboring properties; that the applicants recently changed the plans to request the minimum variance that would place a small home on a small lot but still allow them to have reasonable use of the home and a decent layout.

Ms. Magee asked if the lot was vacant. Mr. Elliot confirmed that the lot is vacant.

Mr. Mills asked if the 1,600 square feet was living space and that there were no other support structures. Mr. Elliot confirmed that it is living space with no other buildings on the lot.

Mr. Sharp asked where the HVAC and steps would be located.

Mr. Elliot testified that the HVAC and steps would be on the rear of the building and would not encroach into the setbacks.

Mr. Sharp stated that the record should state that a variance of four (4) feet for the screened porch on the north side and a variance of four (4) feet for the corner of the home on the north side are needed.

Mr. Elliot testified that there would be no building in the drainage easement.

The Board found that no parties appeared in support of or in opposition to the Application.

Ms. Magee moved to approve Variance Application No. 12172 for the requested variances based on the record made at the public hearing and for the following reasons:

1. The Property is unique due to its shape;
2. The Property cannot otherwise be developed in strict conformity with the Sussex County Zoning Code;
3. The exceptional practical difficulty has not been created by the Applicants;
4. The variances will not alter the essential character of the neighborhood; and
5. The requested variances are the minimum variances necessary to afford relief.

Motion by Ms. Magee, seconded by Mr. Workman, and carried unanimously that the **variances be granted for the reasons stated**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12165 – Tilcon Materials, Inc. seeks a special use exception to have an asphalt batching plant (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the west side of Joseph Ln., approximately 1,745 feet north of Bunting Rd. 911 Address: 22351 Joseph Ln., Georgetown. Zoning District: AR-1. Tax Parcel: 133-6.00-53.09

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of the Application and no correspondence in opposition to the Application. The Applicant seeks a special use exception for a renewal for five (5) years. It was previously approved in 2001 under case number 7357, approved in 2006 under case number 9629, and approved in 2013 under case number 11230.

Jay Miller was sworn in to testify about the Application.

Mr. Miller testified that the request is for an asphalt plant; that the Property has been used for this purpose for the past 20 years; that the facility is used as a drum plant for many years; that the use has not changed since he last appeared before the Board in 2013; and that the Applicant has upgraded the facility.

Ms. Magee asked for an explanation of the differences between a drum plant and a batching plant and if the drum plant creates more traffic.

Mr. Miller testified that a drum plant creates less traffic because the asphalt could be made earlier and store in silos; that a drum plant does continuous mix and could make between 200-300 tons per hour, whereas with a batch plant you only make batches of 3-5 tons; that a batch plant has a tower; and that there are not many batch plants left in Delaware.

Mr. Workman asked if the same material is manufactured in both a batch and a drum plant.

Mr. Miller testified that it is the same material, but the drum plant is a newer type system; and that the site is adjacent to deep water ponds.

Ms. Magee asked if there were any violations with DNREC.

Mr. Miller testified that there were no violations and they are current with all permits.

Ms. Magee asked if the millings taken up on the roads are recycled.

Mr. Miller testified that they do recycle and that up to 40% of the new material is recycled material.

Ms. Magee asked if the plant converted to natural gas.

Mr. Miller testified that the conversion to natural gas has been completed; and that the Applicant maintains the road near the plant and recently repaired the road.

Mr. Sharp asked if there is a tree buffer.

Mr. Miller testified that there is a tree buffer on the property.

Mr. Sharp asked if there had been any complaints about the plant and how many trucks on average per day.

Mr. Miller testified that there have been no complaints about the plant; that there are roughly fifty (50) trucks per day; that the plant is adjacent to a sand plant; that there are no issues with dust or noise due to the tree buffer; that the industry is slower now than it was in the past; and that there is more traffic related to the sand plant than the asphalt plant.

The Board found that no parties appeared in support of and two (2) parties appeared in opposition to the Application.

Rebecca Breasure and Geri Clark were sworn in to testify in opposition to the Application.

Ms. Breasure asked for clarification on the type of plant. Ms. Breasure testified that she appeared in opposition to this plant in 1997 when it was first built; that she wanted to know the stipulation regarding hours of operation; that operations begin very early at the plant; that there is noise of trucks backing up and doors being slammed; that there is an odor; that there is ash in the air; that there is an issue with water; that many of the neighbors have had to drill new wells; that she is unsure if the issue with the wells is due to the sand plant or the asphalt plant; that the location of the stop sign is a problem; and that she has concerns about the danger caused by the number of trucks especially as there are three (3) daycare facilities in the area.

Mr. Callaway asked if Ms. Breasure had any data on how many accidents have happened in that area.

Ms. Breasure testified there have been no accidents to her knowledge but that she expects there will be in the future.

Ms. Clark testified that the stop sign has been in existence for many years and it is dangerous along the road.

Ms. Breasure testified that the asphalt plant or the sand plant are not supposed to use Kruger Road to Breasure Road; and that there is poor visibility at the corner of Breasure Road and Kurger Road due to a fence.

Mr. Mills testified that the Board could not rule on the sand plant but only on the asphalt plant and that the neighbors would need to contact Delaware Department of Transportation about traffic issues.

Ms. Clark testified that the Applicant also uses Breasure Road and Kruger Road; and that a new well had to be drilled on her property because of the water use by the asphalt plant.

Mr. Miller testified that the asphalt plant does not use much water; that the sand plant uses water; that asphalt and water do not mix; and that the asphalt plant would use less water than an average household.

Ms. Clark testified that Melvin Joseph's wife paid for new wells in the area.

Ms. Breasure testified that she wants to see the road widened.

The Board took a ten (10) minute recess.

Ms. Walls stated that, during the recess, she researched the previous cases and that case number 7357 approved on March 12, 2001 stipulated that the hours of operation would be from 6:00 am – 5:00 pm, with exception for state projects which may require additional hours and that there has been no request for change of hours since 2001.

Ms. Magee stated that in 2001 the renewal request included the Emission Compliance Test Results Summary, DeIDOT Entrance Approval and Comments, Average Load Information, and Job Information, and she questioned why that information was not included in this application.

Mr. Miller testified that he could provide that information; that the Applicant has no EPA violations; and that the Applicant does not create ash as part of its process.

Ms. Breasure testified that she has observed black specks; that she lives on Breasure Road; and that her brother has black specks on his property.

Mr. Miller testified that DNREC has very strict regulations on airborne pollutants and he suggested that the specks could come from the nearby Route 113.

Mr. Mills stated that there is a large buffer between the Applicant's property and the neighbor's property.

Mr. Sharp stated that the Board could leave the record open for the limited purpose of allowing

the Applicant to submit the requested information and to allow the Board to ask questions of the Applicant regarding that information; that the Board could specify a date when the applicant should submit all the requested information; that the record could be left open for the limited purpose of allowing the applicant to provide documentation to the Board regarding its DNREC, EPA permits, any violation notices, compliance reports, etc.; that these documents could be submitted by the last Monday in July to give the Board time to review prior to the first hearing in August; and that, if the Board elected to proceed in this fashion, the case could be on the agenda for the first meeting in August under old business for the limited purpose of allowing the Board to ask questions of the applicant regarding any of the submissions for the record.

Mr. Miller testified that the Applicant has a highly rated safety record; that the curvature of the road prohibits a loaded truck to no more than 15 mph; that the road is curved to deter speeding on the road; that the Applicant purchased Tilcon in 2009; and that he can provide a history of the site since the Applicant's acquisition of Tilcon.

Motion by Ms. Magee, seconded by Mr. Mills, and carried unanimously that the **record be left open for limited purpose to receive requested documentation from the Applicant by the last Monday in July and that the case be placed on the August 6, 2018 agenda where the Board can ask any questions of the Applicant that arise from the documentation after review.** Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

ADDITIONAL BUSINESS

Reorganization

Mrs. Walls asked Mr. Sharp if it was necessary to do administration of oaths.

Mr. Sharp stated that oaths are required per the Code for the Planning & Zoning Commission but not for the Board.

Mrs. Walls opened nominations.

Mr. Callaway stated he would not accept a nomination for chairman for the coming year.

Ms. Magee nominated Mr. Mills as chairman. Mr. Workman seconded the nomination.

There were no other nominations. Mrs. Walls closed the nominations. The vote was 4-0.

Mr. Mills nominated Mr. Callaway as vice-chairman. Mr. Workman seconded the nomination.

There were no other nominations. Mrs. Walls closed the nominations. The vote was 4-0.

Mrs. Walls resigned her position as Board secretary and notified the Board that this would be her last meeting.

Mr. Sharp suggested that the Board could appoint Planning & Zoning Director Janelle Cornwell as interim secretary or could appoint Ms. Cornwell and / or her designee as Board secretary.

Mr. Callaway made a motion that Ms. Cornwell be appointed as Board secretary, seconded by Ms. Magee. Motion carried 4-0.

Mr. Sharp stated that he submitted a memorandum to the Board regarding the Rules of Procedure; that the Board rules were last updated in 2015; that there was a typographical error from that update that should be corrected; and that the proposed amendment would correct the error found in the last sentence of Rule 4.3. Mr. Sharp recited the proposed amendment to the rule of procedure.

Mr. Callaway made a motion to amend Rule 4.3 as proposed, seconded by Mr. Workman. Motion carried 4-0.

Ms. Magee stated that there have been issues with some of the surveyors and contractors and that she wondered if the Board has any recourse or if these contractors be subpoenaed to appear.

Mr. Sharp stated the Board does have the right to subpoena any person but this option is rarely used; that sometimes the Board directs him to send letters to builders or surveyors; that he does not recall having to send multiple letters to the same builder; and that the issuance of subpoenas can be a burden on staff so they have been issued judiciously.

Ms. Magee asked if there is any recourse for the Board to take action against surveyors who repeatedly make mistakes.

Mr. Sharp stated that there is no penalty that the Board can levy against them; and that the letters have been effective.

Ms. Magee asked for confirmation that a case can be left open for a builder to show up for testimony.

Mr. Sharp stated that is always an option, but the builder or surveyor may not show up even if subpoenaed; and that the Board has a right to assess credibility of witnesses.

Mr. Mills stated that the application can always be denied.

Meeting was adjourned at 9:12 p.m.